

1  
2  
3  
4 UNITED STATES BANKRUPTCY COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6

7 In re

No. 02-40312 TT  
Chapter 7

8 SCOTT T. FULLER,

9 Debtor.  
\_\_\_\_\_ /

10 SCOTT T. FULLER,

A.P. No. 02-4805 AT

11 Plaintiff,  
12

12 vs.

13 U.S. DEPARTMENT OF EDUCATION,  
14 et al.,

15 Defendants.  
16 \_\_\_\_\_ /

17 **MEMORANDUM OF DECISION RE DISCHARGEABILITY OF STUDENT LOANS**

18 The above-captioned adversary proceeding was tried to the  
19 Court on February 25, 2003. Plaintiff Scott T. Fuller (the  
20 "Debtor") is the debtor in the above-captioned chapter 7 case.  
21 The defendants U.S. Department of Education ("DOE") and The  
22 Education Resources Institute ("TERI") are the obligees of the  
23 Debtor's student loans. In this adversary proceeding, the Debtor  
24 seeks to discharge his student loans in their entirety on the  
25 ground that excepting them from his discharge would impose an  
26 undue hardship. See 11 U.S.C. § 523(a)(8). Having heard the  
evidence presented and the argument made, the Court concludes that

1 judgment should be entered for defendants. The reasons for the  
2 Court's decision are set forth below.

### 3 **SUMMARY OF FACTS**

4 The Debtor was born in 1967. Thus, as of the date of the  
5 trial, he was only 35 or 36. After graduating from high school,  
6 the Debtor attended a community college, intending ultimately to  
7 go to medical school. He received a two year college degree.  
8 Thereafter, he attended chiropractic school where he received a  
9 degree in 1998.

10 According to the Debtor, to be licensed as a chiropractor, one  
11 must pass a four part national exam and a state exam. The state  
12 exam cannot be taken until the applicant has passed all four parts  
13 of the national exam. The Debtor passed the first three national  
14 examinations. However, he did not pass the fourth part on his  
15 first try. He was unable to figure out how to support himself  
16 while studying for and taking it again. Since he was no longer in  
17 school, he could not borrow any more money under the student loan  
18 programs, and he had no more available credit on his credit cards.  
19 Moreover, according to the Debtor, by this time, he had lost  
20 interest in becoming a chiropractor.

21 Instead, the Debtor took a real estate course at a local  
22 junior college. Through a referral from his teacher, he obtained  
23 a job as a real estate broker at Norwest Mortgage. Since then,  
24 the Debtor has held a series of jobs of this nature with various  
25 companies. The Debtor's compensation in all of these positions  
26 has been a low guaranteed salary with the possible upside of

1 commissions based on transactions attracted and closed.  
2 Unfortunately, he has not been terribly successful to date in  
3 attracting and closing loans.

4 The Debtor is physically and psychologically healthy. He has  
5 no dependents. To the contrary, he lives with his girlfriend in  
6 a house that she owns. He pays \$900 per month in rent and shares  
7 the cost of the utilities when he has enough money to do so.

8 The Debtor has five separate loans held by TERI. Two of these  
9 have 20 year terms; three have ten year terms. The terms on these  
10 loans started to run on various dates from 1999 to 2001. His  
11 total debt to TERI is approximately \$50,000. The interest rates  
12 range from 4.11 percent to 6.25 percent per year. In or about  
13 2000, the Debtor paid \$2,000 to \$3,000 on these loans to prevent  
14 a lawsuit being filed against him.

15 The Debtor's debt to the DOE is based on a consolidation of  
16 student loans in 1999. The total debt to the DOE, as of the date  
17 of trial, was approximately \$190,000. The interest rate on the  
18 principal balance of this loan is 4.06 percent per year. The term  
19 of the loan depends on the repayment program the Debtor chooses.  
20 To date, the Debtor has not selected a program. However, if he  
21 did, he would most likely select the Income Contingent Program  
22 which has a term of 25 years. Under this program, he will not be  
23 required to make any payment if he cannot afford to do so.

24 The Debtor also incurred substantial credit card debt over the  
25 years. After his student loans came due and before filing his  
26 bankruptcy petition, on the advice of a credit counselor, the

1 Debtor made payments on his credit card debt rather than paying  
2 his student loans because the interest rates on the credit card  
3 debt were higher than on the student loans.

#### 4 DISCUSSION

5 The leading case in the Ninth Circuit on the dischargeability  
6 of student loan obligations is In re Pena, 155 F.3d 1108 (9<sup>th</sup> Cir.  
7 1998). Pena adopts a three prong test for dischargeability of  
8 student loans first set forth in In re Brunner, 831 F.2d 395, 396  
9 (2<sup>nd</sup> Cir. 1987). See Pena, 155 F.3d at 1112. Under this test, to  
10 discharge student loans, the Debtor must establish each of the  
11 following elements:

- 12 (1) that the debtor cannot maintain, based on current  
13 income and expenses, a "minimal" standard of living...if  
14 forced to repay the loans;  
15 (2) that additional circumstances exist indicating that  
16 this state of affairs is likely to persist for a  
significant portion of the repayment period of the  
student loans; and (3) that the debtor has made good  
faith efforts to repay the loans.

17 Brunner, 831 F.2d at 396. The Debtor has the burden of proof on  
18 each of these elements. In re Faish, 72 F.3d 298, 306 (3<sup>rd</sup> Cir.  
19 1995); In re Nascimento, 241 B.R. 440, 445 (Bankr. 9<sup>th</sup> Cir. 1999).

20  
21 A court is not required to determine whether to discharge  
22 student loan debt on an all-or-nothing basis. If the Court  
23 determines that a debtor has satisfied the second and third prong  
24 of the Brunner test and could repay a *portion* of his or her  
25 student loans while still maintaining a minimal standard of  
26 living, the Court may grant the debtor a *partial* discharge. See

1 In re Myrvang, 232 F.3d 1116, 1122 (9<sup>th</sup> Cir. 2000)--holding that  
2 bankruptcy court may grant partial discharge under § 523(a)(15)  
3 and rejecting the Bankruptcy Appellate Panel's contrary conclusion  
4 under § 523(a)(8) in In re Taylor, 223 B.R. 747 (Bankr. 9<sup>th</sup> Cir.  
5 1998).

6 Applying these principles to the facts of this case, the Court  
7 concludes that the Debtor would be entitled to a partial discharge  
8 based on his current financial condition. However, the Debtor has  
9 failed to satisfy the second and third prongs of the Brunner test.  
10 Thus, judgment must be entered in favor of the defendants.

11 **A. ABILITY TO MAINTAIN "MINIMAL" STANDARD OF LIVING AND REPAY**  
12 **LOANS**

13 As recited above, the first prong of the Brunner test is that  
14 the debtor cannot maintain a "minimal" standard of living if  
15 forced to repay his student loans. Brunner, 831 F.2d at 396. To  
16 satisfy this prong requires a showing of more than "tight  
17 finances." In re Rifino, 245 F.3d 1083, 1087 (9<sup>th</sup> Cir. 2001). The  
18 required standard falls somewhere between "temporary financial  
19 adversity" and "utter hopelessness." Id., quoting from In re  
20 Nascimento, 241 B.R. 440, 445 (Bankr. 9<sup>th</sup> Cir. 1999).

21 The Debtor contends that he is unable to maintain a "minimal"  
22 standard of living and repay any portion of his student loans.  
23 When the Debtor filed his bankruptcy petition, as required by the  
24 bankruptcy rules, he filed a budget showing his income and  
25 expenses (the "Budget"). He listed \$3,000 per month as his income  
26 and \$5,215 as his expenses. However, \$3,000 of his expenses

1 represented payments on his student loans. If the student loan  
2 payments are deducted from his expenses, the Debtor has disposable  
3 income of \$785 per month.

4 The Debtor testified that some of his expenses had increased  
5 since he filed the Budget. However, the Court did not find the  
6 Debtor's testimony persuasive. The increased expenses did not  
7 appear essential and thus were not in keeping with the stringent  
8 standard established by the statutory and case law. Therefore,  
9 the Court concludes that the Debtor could pay \$785 per month on  
10 his student loans and still maintain a minimal standard of living.<sup>1</sup>  
11

12 As recited above, the balance due on the student loans is  
13 presently approximately \$240,000. Moreover, if the loans are not  
14 discharged, interest will continue to accrue on the principal  
15 balances of the loans, thereby increasing the Debtor's student  
16 loan debt. Clearly, the Debtor could not pay these loans in full  
17 within their terms by paying \$785 per month. If the Debtor had  
18 satisfied the other two prongs of the Brunner test, the Court  
19

---

20  
21 <sup>1</sup>Arguably, at least one of the Debtor's expenses had  
22 decreased. The Debtor's list of expenses included \$900 for  
23 rent. The Debtor testified that he had the use of two bedrooms  
24 and that he allocated \$450 of his rent to the use of the bedroom  
25 as an office. At trial, the Court stated that it did not  
26 consider essential the use of the second bedroom as an office  
based on the Debtor's current employment. On further  
reflection, the Court concludes otherwise. The Debtor's  
allocation of \$450 of the \$900 rent to the use of the second  
bedroom as an office seems artificial, and \$900 for rent in the  
San Francisco Bay Area seems sufficiently low to qualify as  
minimal.

1 would grant the Debtor a partial discharge, leaving undischarged  
2 only \$100,000 of the student loans, spread among the various loans  
3 on a pro rata basis. However, as explained below, the Court  
4 concludes that the Debtor has not satisfied the second of the two  
5 Brunner prongs.

6 **B. LIKELIHOOD THAT STATE OF AFFAIRS WILL PERSIST FOR SIGNIFICANT**  
7 **PORTION OF REPAYMENT PERIOD**

8 The second prong of the Brunner test is that "additional  
9 circumstances" exist that make it likely that the debtor's current  
10 situation will persist for a significant portion of the repayment  
11 period. This prong has been interpreted as requiring evidence of  
12 some type of barrier to the debtor's improving his current  
13 financial circumstances. Examples of such barriers are  
14 "psychiatric problems, lack of usable job skills and severely  
15 limited education." In re Birrane, 287 B.R. 490, 497 (Bankr. 9<sup>th</sup>  
16 Cir. 2002).

17 The Debtor failed to meet his burden of proof on this issue.  
18 The Debtor has worked for a series of employers in the real estate  
19 mortgage field over the past four years. He has not yet  
20 experienced any great success. However, the Debtor is young,  
21 personable, and reasonably intelligent. The Court cannot  
22 conclude that he will never earn more than he does at present.<sup>2</sup>

---

23  
24 <sup>2</sup>In Birrane, the Bankruptcy Appellate Panel reversed the  
25 bankruptcy court's determination that the debtor's student loans  
26 should be discharged. The Panel concluded that the debtor had  
failed to satisfy either the second or third prong of the  
Brunner test. The debtor was 36 years old with no dependents  
and no physical disabilities. She had a Master of Fine Arts

1           At trial, it was noted that the Debtor could have earned more  
2 if he had simply accepted a straight, salaried job. Instead, he  
3 persisted in taking jobs with low guaranteed wages but with a  
4 possible upside of commissions. Unfortunately, to date, he has  
5 not consistently succeeded in earning substantial commissions.

6           However, the Court was not persuaded that this situation was  
7 likely to continue for the next ten to fifteen years. It is just  
8 as likely either that the Debtor will have greater success in  
9 earning commissions in the future or that he will conclude that  
10 his better course is to take a job with a higher guaranteed salary  
11 even though it does not offer the possibility of large  
12 commissions. The Debtor's counsel attempted to overcome the  
13 Debtor's failure to present evidence to satisfy this prong by  
14 contending that the Debtor's track record to date established that  
15 he was destined to failure. The Court found the closing argument  
16 eloquent but unpersuasive.

17  
18  
19           degree with an emphasis on dance choreography and performance.  
20 At the time of trial, she was employed as an independent  
21 contractor, teaching creative and modern dance to children. She  
22 had also started her own dance company four years earlier, to  
23 which she devoted approximately half her time but which had not  
24 yet generated sufficient revenues to pay her a salary. 287 B.R.  
25 at 493. At the time of trial, her income and expenses were  
26 approximately equal. 287 B.R. at 495. The Panel reversed the  
trial court's decision, discharging the debtor's student loans,  
on the ground that, among other things, the debtor had failed to  
establish that her financial condition was unlikely to improve.  
The Panel stated as follows: "Given her hard work, talent, and  
exposure to the public, it appears that...[the debtor's]  
prospects at future employment within her chosen field are quite  
good." 287 B.R. at 498. The same may be said of the Debtor.



1           The Debtor's relative lack of success in earning commissions  
2 to date does not persuade the Court that his financial  
3 circumstances will not improve in the future. With more  
4 experience and additional contacts, developed over a few more  
5 years, the Debtor is virtually certain to have more success. If  
6 not, the Court believes, he will seek and find a more lucrative  
7 job. He has already demonstrated the ability to give up on one  
8 career plan when it does not prove feasible.

9  
10           In seeking to discharge his student loan debts, the Debtor  
11 relied heavily on In re Peel, 240 B.R. 387 (Bankr. N.D. Cal.  
12 1999), a case with many factual similarities. In Peel, the debtor  
13 was 33 years old, healthy, and had no dependents. He also held a  
14 chiropractic degree and, unlike the Debtor, had been employed in  
15 his field for a time. However, by the time of trial, he had been  
16 unable to find such work for a number of years. Instead, he was  
17 working as a technical support representative for a medical  
18 software company, earning approximately \$25,000 per year in  
19 adjusted gross income. His expenses were approximately \$1,958 per  
20 month or \$23,496 per year. 240 B.R. at 389-393.

21           The Peel court found that the debtor's chiropractic degree did  
22 not assist him in earning a living. To improve his circumstances  
23 in the computer industry, he would be required to obtain  
24 additional education or training. However, he could not afford to  
25 obtain such education or training given his student loan and other  
26 debts. Therefore, the Court concluded that the debtor's financial

1 circumstances were not likely to improve during the remaining term  
2 of the loan.

3 The Peel decision may be distinguished in certain factual  
4 respects. However, more important, the Peel decision is based on  
5 the judge's evaluation of a particular debtor after observing that  
6 debtor in court. Based solely on the facts recited in the  
7 decision, the Court does not believe it would have reached the  
8 same decision as the Peel judge. However, the Court did not have  
9 the benefit of that judge's observation of the debtor.

10 **C. DEBTOR'S GOOD FAITH EFFORTS TO REPAY LOAN**

11 The third prong of the Brunner test is that the Debtor must  
12 have made a good faith effort to repay the student loans. A  
13 debtor may satisfy this standard even though he has made no  
14 payments on the student loans if he establishes that, due to  
15 forces beyond his reasonable control, he never had the ability to  
16 make any payments and still maintain a minimal standard of living.  
17 In re Peel, 240 B.R. at 395. The Court concludes that the Debtor  
18 has not satisfied this prong either. As recited above, the  
19 Debtor made no payments whatsoever on the DOE loans. He made  
20 payments on the TERI loans only when forced to by the threat of a  
21 lawsuit.

22 The Debtor clearly had the ability to make some payments on  
23 the student loans during the last five years. On the advice of a  
24 financial counselor, the Debtor paid credit card bills rather than  
25 paying on the student loans. The rationale was that he should pay  
26 those debts first that accrued interest at the highest rate. This

1 strategy makes perfect sense if one ultimately pays off all one's  
2 debts. However, in a bankruptcy context, the Court simply cannot  
3 conclude that paying *non-student loan debt* while not paying  
4 *student loan debt* constitutes a good faith effort to repay *student*  
5 *loan debt*. The Court acknowledges that, in Pena, the Ninth  
6 Circuit affirmed the lower court's finding of good faith despite  
7 the debtors having used \$8,000 in back disability benefits to buy  
8 a car and pay bills other than their student loans. However, in  
9 Pena, the debtors' other bills were four times those of the  
10 student loans. See Pena, 155 F.3d at 1114. In this case,  
11 according to the bankruptcy schedules, the Debtor's credit card  
12 debt is only half his student loan debt.

### 13 CONCLUSION

14 Judgment will be entered in favor of the defendants. Based  
15 on the first prong of Brunner only, the Debtor would be entitled  
16 to a partial discharge. The Court would discharge all but  
17 \$100,000 of the Debtor's student loans based on his present income  
18 if it were persuaded that the Debtor's financial condition were  
19 likely to persist for a significant portion of the remaining terms  
20 of the loans and that the Debtor had made a good faith effort to  
21 repay the student loans. However, the Debtor failed in  
22 establishing each of these two prongs.

23 This judgment is without prejudice to a future determination  
24 to the contrary. At some time in the future, based on changed  
25 circumstances, the Debtor may be able to satisfy these two prongs.  
26 Counsel for the defendants are directed to prepare a proposed form

1 of judgment in accordance with this decision and to submit it to  
2 the Court.

3 Dated: March 12, 2003  
4

5 \_\_\_\_\_  
6 United States Bankruptcy Judge  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1  
2  
3 PROOF OF SERVICE

4 I, the undersigned, a regularly appointed and qualified  
5 clerk in the office of the United States Bankruptcy Court for  
6 the Northern District of California at Oakland, hereby  
7 certify:

8 That I, in the performance of my duties as such clerk,  
9 served a copy of the foregoing document by depositing it in  
10 the regular United States mail at Oakland, California, on the  
11 date shown below, in a sealed envelope bearing the lawful  
12 frank of the Bankruptcy Court, addressed as listed below.

13 I declare under penalty of perjury under the laws of the  
14 United States that the foregoing is true and correct.

15 Dated: March \_\_\_\_, 2003  
16  
17 \_\_\_\_\_  
18 \_\_\_\_\_

19 Office of the United States Trustee  
20 Document placed in UST mailbox at  
21 US Bankruptcy Court  
22 1300 Clay Street, Third Floor  
23 Oakland, CA 94612

24 Jay Chafetz  
25 Law Office of Jay Chafetz  
26 2033 N. Main St.  
Walnut Creek, CA 94596

Stephen L. Johnson  
Assistant United States Attorney  
450 Golden Gate Ave., Box 36055  
San Francisco, CA 94102

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Miriam Hiser  
Law Offices of Miriam Hiser  
3330 Divisadero  
San Francisco, CA 94123